tiff would be entitled to $5,850.97 in this case. There would also be a declaration that plaintiff is entitled to recover from the defendant firm all further sums which plaintiff may receive by way of commission up to June 29, 1972, based on the balance sheets of the company filed with the Registrar of Companies. The appeal is accordingly allowed with costs here and below.

Suffian L.P. and **Wan Suleiman F.J.** concurred

Solicitors: *Tang & Co.; Battenberg & Talma.*

RE DATUK JAMES WONG KIM MIN; MINISTER OF HOME AFFAIRS, MALAYSIA & ORS. v. DATUK JAMES WONG KIM MIN

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) August 24, 1976]

[Kuching — Federal Court Civil Appeal No. 146 of 1975]

Administrative Law — Habeas Corpus — Person detained under Preservation of Public Security Ordinance, Sarawak, 1962 — Ordinance declared Federal Law — Whether operation of law extended throughout Malaysia — Whether Minister has power to order a person to be detained outside Sarawak — Whether order can be made against person who is outside Sarawak — Prerogative Remedies Ordinance (Cap. 47) — Preservation of Public Security Ordinances 1962, s. 4 — Malaysia Act, 1963, ss. 73(3) and 74 — Federal Constitution, Article 159A.

This was an appeal from the decision of Seah J. ([1975] 2 M.L.J. 244) in which he held that an order of detention made against the respondent under the Preservation of Public Security Ordinance, 1962, was unlawful, as at the time when the detention order was made by the Federal Secretary, Sarawak, the detainee was not in Sarawak.

Held, dismissing the appeal: (1) although the Preservation of Public Security Ordinance 1962 of Sarawak was declared to be a Federal Law it continued to have effect only in Sarawak;

(2) neither the Minister nor the Federal Secretary acting on his behalf could order a person to be detained outside Sarawak;

(3) the Minister and the Federal Secretary had power to make a detention order in respect of a person who when the order was made was outside Sarawak but the detention order could only have effect when the person concerned sets foot in Sarawak.

Cases referred to:-

(1) *Assa Singh* v. *Mentri Besar, Johore* [1969] 2 M.L.J. 30.

(2) *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 184.

(3) *Chia Khin Sze* v. *Mentri Besar, Selangor* [1958] M.L.J. 105.

(4) *Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 M.L.J. 92.

(5) *Macleod* v. *Attorney-General of New South Wales* [1891] A.C. 455, 457-458.

(6) *Croft* v. *Dunphy* [1933] A.C. 156, 165.

(7) *Wallace Brothers & Co. Ltd.* v. *Commissioner of Income Tax, Bombay* A.I.R. 1948 P.C. 118; (1948) 75 I.A. 86, 98 (P.C.).

(8) *Re Choo Jee Jeng* [1959] M.L.J. 217.

(9) *Karam Singh* v. *Mentri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.

FEDERAL COURT.

Datuk Haji Abdullah Ngah, Senior Federal Counsel (*Zaki bin Tun Azmi* Federal Counsel with him) for the appellant.

Datuk David Marshall (*K.C. Fong* with him) for the respondent.

Suffian L.P.: On October 30, 1974, Datuk James Wong Kim Min, the applicant in the lower court and respondent before us (the detainee), was arrested by police officers at his home in Sarawak. He was arrested under regulation 7(1) of the Preservation of Public Security Regulations. After his arrest, he was escorted to Peninsular Malaysia and held in Kuala Lumpur. On December 28, 1974, a detention order addressed to the Superintendent of Prison, Taiping, Perak, and made by the Federal Secretary, Sarawak, under paragraph (1) of regulation 2 of the Preservation of Public Security (Detention) Regulations, 1962, which I shall refer to simply as PPSR, was served on him in Kuala Lumpur.

On January 3, 1975, the Federal Secretary, Sarawak, signed a Removal Order under paragraph 5 of regulation 2 of PPSR directing that the detainee be removed from Taiping Prison, Perak, to Kamunting Detention Camp, Perak, Peninsular Malaysia.

It will be noted that when the detention order was made, the detainee was outside Sarawak and he has throughout been detained outside Sarawak.

The detainee applied *ex parte* for a writ of *habeas corpus* under section 3 of the Prerogative Remedies Ordinance (Sarawak Cap. 47), citing as respondents the Minister of Home Affairs, Malaysia, the Federal Secretary, Sarawak, and the officer in charge of Kamunting Detention Centre, Taiping, Perak. (These respondents are appellants before us).

Formal hearing of the application began before Seah J. in Kuching on March 3, 1975.

Datuk Marshall submitted that the detention was unlawful and that the application should be allowed on ten grounds, of which the second ground reads:—

"(2) Assuming that the Federal Secretary, Sarawak had the authority to issue such a Detention Order, the PPSR being an exclusively Sarawak law, could only authorise him to detain a person who was in Sarawak at the time when the said Order was made."

The learned trial judge dealt only with ground 2. He held that the Preservation of Public Security Ordinance (PPSO) enacted by the Sarawak Legislature and PPSR made under it before Malaysia Day were before Malaysia Day limited in their operation to the colony of Sarawak only; that after Malaysia Day they still had no legal force outside the state of Sarawak although Sarawak is one of the component states of Malaysia; that at the time when the detention order was made by the Federal Secretary, Sarawak, the detainee was not in Sarawak but in Kuala Lumpur; and that therefore the order of detention was unlawful.

At the conclusion of the hearing on March 7, 1975, the learned judge delivered a brief oral judgment announcing his decision and ordering that the detainee be produced before the court on Monday, March 10, 1975, at 2.15 p.m. to be released. The detainee was duly produced before the court and he was formally released.

In his grounds since reported at [1975] 2 M.L.J. 244 the learned trial judge said that in view of his

decision on the second ground, it was unnecessary for him to deal with the other 9 grounds.

The Minister, the Federal Secretary and the officer in charge of Kamunting Detention Camp appeal against the learned judge's order. This appeal has been made under subsection (3) of section 3 of the Prerogative Remedies Ordinance (Sarawak Cap. 47), but under paragraph (b) of that subsection this appeal "shall not affect the right of the detainee to remain discharged in pursuance of the order under appeal and to remain at large regardless of the decision on appeal." In view of this, Datuk Marshall raised the preliminary objection that the court should not proceed to hear the appeal, as the matter was now, he said purely academic and it was not the court's function to enrich the law reports on hypothetical questions. We overruled the objection, because this is a test case which should settle similar legal questions arising in the future.

The relevant Sarawak law applicable has been set out in full in the judgment of the learned Chief Justice, Borneo, and there is no need for me to reproduce it.

The issue in this appeal is whether or not the Federal Secretary could lawfully under paragraph (1) of regulation 2 of PPSR by order direct the detainee to be detained when at the time of the order the detainee was outside Sarawak.

Before Malaysia Day the Sarawak legislature had power to make law on internal security. So the PPSO and PPSR were perfectly valid, but it is clear that the detaining authority in Sarawak could not then order a person to be detained outside Sarawak. After Malaysia Day however when Sarawak ceased to be a Crown Colony and became independent as a member state of Malaysia, Sarawak became voluntarily subject to the Malaysian constitution and under this constitution internal security is a federal subject, so that both legislative and executive authority over internal security is now vested in the Federation and in particular the Sarawak legislature no longer has power to make law on it, see item 3, List I in the Ninth Schedule to the Constitution. But the advent of Malaysia Day did not however automatically repeal the Sarawak laws; on the contrary they were expressly saved by section 73 of the Malaysia Act, which by subsection (5) provides that the Sarawak laws were "present laws" and by subsection (1) that "they shall, on and after Malaysia Day, have effect according to their tenor, and be construed as if this Act had not been passed." Further by subsection (3), the section provides that as these Sarawak laws cannot be passed after Malaysia Day by the Sarawak legislature they "shall, on and after Malaysia Day, be treated as federal laws." These provisions do not in my view mean that on and after Malaysia Day the PPSO and PPSR automatically take effect throughout Malaysia. I say so because subsection (1) of section 73 which saved them from automatic repeal expressly says, as has been noted, that on and after Malaysia Day they shall have effect *according to their tenor and as if the Malaysia Act had not been passed*, i.e. within Sarawak only, as was the case before Malaysia Day. If that were not so, there would have been no necessity for section 74 of the Malaysia Act, of which subsections (1) and (2) provide:

"(1) Subject to the provisions of this section the Yang Dipertuan Agung may by order make such modifications as appear to him to be necessary or expedient in consequence of the passing of this Act in any present law relating to matters [such as internal security] about which Parliament has power to make laws.

(2) Subject to sub-section (3), the power to make orders under sub-section (1) shall include power to extend throughout Malaysia or to any State or States thereof any present law in force in any part of Malaysia about any such matter; but except in consequence of the extension of any present law no such order shall modify any State law" (this sub-section is given as amended by Act 31/65).

It is clear from these provisions that any Sarawak law passed before Malaysia Day on a matter which on and after Malaysia Day became a matter concerning which Parliament (not the Sarawak legislature) has power to make law, on and after Malaysia Day remains good law, but it continues to have effect only within Sarawak. The fact that it has been declared to be federal law makes no difference; the declaration only means that it has been agreed that it relates to a matter with respect to which Parliament has power to make law, not that it extends outside Sarawak. However the Yang Dipertuan Agung may by order make such modifications as may appear to him necessary or expedient in that law, and this royal power includes power to extend throughout Malaysia that law. Note the words in subsection (2) of section 74 "but except in consequence of the extension of any present law no such order shall modify any State law." To my mind these words mean that unless the Yang Dipertuan Agung has made an order expressly extending a Sarawak law throughout Malaysia that law on and after Malaysia Day continues to have effect only within Sarawak.

Has such an order been made extending PPSO and PPSR throughout Malaysia?

After Malaysia Day PPSO and PPSR were amended by various notifications in the Gazette, but in my view the effect of these amendments is not to extend the power of the detaining authority acting under PPSO and PPSR to detain some one who is outside Sarawak but simply to provide that the power to detain such a person within Sarawak must in future be exercised by the Minister or his lawfully authorized delegate, no longer by the authority which before Malaysia Day had power to do so. There is not a word in these amendments to suggest that PPSO and PPSR were being extended throughout Malaysia, so that the new authorities can under them detain a person outside Sarawak. These laws affect the liberty of the subject and in the case of doubt or ambiguity they should be interpreted against Authority and in favour of the citizen.

I am not unmindful of the argument on behalf of the respondents that the Minister mentioned in regulation 2 of PPSR is not a State Minister with jurisdiction only in Sarawak, but is a Federal Minister, that he has jurisdiction not only within Sarawak but throughout Malaysia, that the Federal Secretary when ordering the detainee's detention under paragraph (1) of regulation 2 of PPSR was acting as the Minister's delegate lawfully authorized by regulation 8, and to secure public safety or maintain public order in Sarawak it was lawful for him to order the detainee to be detained in the words of regulation 2 "in such place

of detention as may be specified in" the detention order and that these words mean in any place of detention even outside Sarawak. I respectfully agree in view of the clear language of regulation 8 that when the Federal Secretary acts under paragraph 1 of regulation 2 his act is the act of the Minister, but I do not agree that he can order a person to be detained outside Sarawak. He has only as much power as the Minister and the Minister can under this provision only detain a person in Sarawak, not outside. I am fortified in my view by paragraph (1) of regulation 3 which expressly provides that it is only the Yang Dipertuan Agung, a higher authority than the Minister or the Federal Secretary, who may order a person detained under paragraph (1) of regulation 2 to leave and remain *out of Sarawak*. There would have been no need for this provision if the Minister had power under PPSO and PPSR to detain a person outside Sarawak.

For the above reasons I would hold that the Federal Secretary has no power under paragraph (1) of regulation 2 to detain a person outside Sarawak. But with respect I do not agree with the argument that he has no power to make a detention order in respect of a person who when the order was made was outside Sarawak. On the contrary, in my view he has that power, though the detention order can have effect only when the person concerned sets foot in Sarawak. In fact the detainee did enter Sarawak immediately prior to his release, when he was brought back by the police from Taiping on the learned judge's order. But the legalizing of his detention then is now academic, because immediately after his release he was re-arrested and detained under the Internal Security Act and the legality of the second detention has not been challenged. (By the time this appeal was heard, the second detention order had been suspended conditionally and the detainee was back living in Sarawak).

I would therefore dismiss this appeal.

There shall be no order as to costs.

Lee Hun Hoe C.J. (Borneo): This is an appeal against the decision of the High Court in issuing a writ of *habeas corpus* for the release of Datuk James Wong, the respondent from detention.

On October 30, 1974 respondent was arrested at his home in Sarawak pursuant to regulation 7(1) of the Preservation of Public Security (Detention) Regulations, 1962 (referred to as PPSR) and taken to Kuala Lumpur. On December 28, 1974 he was served with a detention order bearing the same date and detained at Taiping Prison, Perak. The detention order was signed by the Federal Secretary in the purported exercise of his powers under regulation 2 of PPSR which were made under section 4 of the Preservation of Public Security Ordinance 1962 (referred to as PPSO). Subsequently, a removal order dated January 3, 1975 made by the Federal Secretary under regulation 2(5) of PPSR resulted in the removal of respondent from Taiping Prison to Kamunting Detention Camp in Perak. On February 4, 1975 respondent took out an *ex parte* Notice of Motion praying for a writ of *habeas corpus* under section 3 of the Prerogative Remedies Ordinance (Cap. 47). In the exercise of its power under rule 5 of the Habeas Corpus (Procedure) Rules the High Court directed the notice to be served on appellants. On March 10, 1975 respondent was released but was almost immediately arrested again outside the precincts of the High Court.

At the trial the legality of the detention and the authority of the Federal Secretary to issue the detention order were challenged on some ten grounds, all set out by the learned judge in his judgment. He considered it unnecessary to deal with other grounds because of his conclusion on the second ground which reads:—

"Assuming that the Federal Secretary, Sarawak had the authority to issue such a Detention Order, the PPSR being an exclusively Sarawak law, could only authorise him to detain a person who was in Sarawak at the time when the said Order was made."

The learned judge in a careful judgment came to the conclusion at page 102 of the Appeal Record that:—

"At the time when the purported Detention Order was made by the Federal Secretary, Sarawak the applicant was not in the State of Sarawak but was detained in a place in Kuala Lumpur, Peninsular Malaysia. Since the PPSO and the PPSR have no extra-territorial force outside Sarawak I am constrained to hold that the Federal Secretary, Sarawak and the other respondents herein have failed to satisfy the court as to the validity of the said Order of Detention."

Before us the decision of the learned judge was attacked on some nine grounds. It was submitted that the learned judge was wrong in law to say that the detention was unlawful. Also, he failed to consider that since the authenticity and good faith of the order were not impugned the legality of the detention still stands. In actual fact, the Federal Secretary was exercising the powers of the Minister for Home Affairs when he made the Detention Order. The Minister has jurisdiction over the whole of Malaysia and can decide the place of detention even outside Sarawak. Encik Abdullah Ngah for appellants conceded that the PPSO and subsidiary legislation made thereunder could not be used in other states but for the security of Sarawak. He submitted that the question of "extra-territorial" did not arise in so far as the power of a Federal Minister was concerned. The only matter which the learned judge should look into was whether the Detention Order was valid or not.

On the other hand, Dato Marshall for respondent pointed out that no part of the judgment of the learned judge had been impugned. His basic complaint is that the Detention Order was issued by the Federal Secretary who had no jurisdiction to do so. He further contended that neither the Minister nor the Federal Secretary could serve a Detention Order on any person outside Sarawak under the PPSO which applies to Sarawak only.

In 1946 Sarawak became a Crown Colony after more than a century under Brooke Rule. The PPSO was enacted by the Council Negri (State Legislature) and came into force on May 18, 1962. Its operation was limited to Sarawak and had no extra-territorial effect. There were only eight sections. Section 4 reads:—

"4(1) If at any time the Governor is satisfied that the situation in Sarawak is so grave that the exercise of the powers conferred by section 3 of this Ordinance is inadequate to ensure the preservation of public security he may, by notification in the Gazette declare that the provisions of sub-section 2 of this section shall come into operation, and thereupon those provisions shall come into operation accordingly; and

they shall continue in operation until the Governor by a further notification directs that they shall cease to have effect, whereupon they shall cease to have effect except as respects things previously done.

(2) The Governor may, for the preservation of public security, make regulations to provide, so far as appears to him to be strictly required by the exigencies of the situation in Sarawak, for —

(a) the detention of persons; and

(b) requiring persons to do work and render services."

On December 8, 1962 the Governor declared the provisions of the said section 4(2) to come into operation (see Part II of the Sarawak Government Gazette Notification No. S.220/62). Pursuant to the said section 4 the Governor, on the same day, made the PPSR and the Preservation of Public Security (Detention Orders) Rules. The PPSO and subsidiary legislation made thereunder therefore remained in force when Sarawak joined Malaysia on September 16, 1963. This was also the operative date of the Malaysia Act, 1963. (See Federal Government Gazette L.N. No. 214/63).

By virtue of the Modification of Laws (Internal Security and Public Order) (Borneo States) Order, 1963, made by the Yang Dipertuan Agung in the exercise of his powers under section 74 of the Malaysia Act, the PPSO and subsidiary legislation made thereunder with some modifications, remained effective in Sarawak as "continuing law" on or after Malaysia Day (See Federal Government Gazette L.N. No. 232/63). Amendments to PPSO were made to sections 3(1), 4(1) and 7 by substituting "Yang Dipertuan Agung" for "Governor" wherever such term occurs. In the same way the word "Governor" in sections 3(2), 4(2) and 5 of the PPSO was substituted by "Minister". Also, for the first time the term "local federal authority" was introduced into the PPSR.

Dato Marshall submitted that the said Order was made on September 14, 1963 two days before Malaysia came into existence and was, therefore, void. However, Encik Abdullah Ngah quite rightly pointed out that although the said Order was dated September 14, 1963 paragraph 1 of the said Order stated clearly that it was to come into force on Malaysia Day. The validity of the said Order cannot thus be disputed.

An important amendment was made to the PPSR on October 8, 1963 (See the Sarawak Government Gazette Part II, No. 5(F) 211). Pursuant to section 4 of the PPSO and the Modification of Laws (Internal Security and Public Order) (Borneo States) Order 1963 the Minister of Internal Security made the Preservation of Public Security (Detention) (Amendment No. 4) Regulations, 1963 by which he added a new regulation 8 to the PPSR which reads:—

"8. The local federal authority may, subject to any general or special directions of the Minister, exercise and perform all the functions of the Minister under these regulations and any rules made thereunder except the appointment of the Chairman and members of an Advisory Committee under paragraph (2) of regulation 2 and the appointment of some other person as local federal authority under paragraph (2) of this regulation.

(2) In this regulation —

'functions' includes any power conferred or duty imposed upon the Minister by these regulations;

'local federal authority' means the Federal Secretary in Sarawak and such other person or persons in Sarawak as the Minister may by notification in the Sarawak Government Gazette appoint to be the local federal authority for the purposes of these regulations."

The PPSR went through another amendment on August 11, 1971. This time the Minister of Home Affairs made the Preservation of Public Security (Detention) (Amendment) Regulations 1971 amending the PPSR by inserting a new regulation 1A which reads:—

"1A. In these Regulations (and in any orders or directions given under regulation 2(6) of these Regulations) —

'local federal authority' means the Secretary General, Ministry of Sarawak Affairs, and such other person or persons in Sarawak as the Minister may by notification in the Sarawak Government Gazette appoint to be the local federal authority for any of the purposes in these Regulations."

The words "paragraph 2 of this regulation" in regulation 8(1) above were deleted and replaced by "regulation 1A" and the definition of "local federal authority" in regulation 8(2) was completely deleted. (See Sarawak Government Gazette, 1971 Part II Swk. L.N. (F) 100).

Finally, on February 27, 1975 by the Preservation of Public Security (Detention) (Amendment) Regulations, 1975 the Minister of Home Affairs amended the definition of "local federal authority" in regulation 1A by substituting "Federal Secretary, Sarawak" for "Secretary-General, Ministry of Sarawak Affairs". The amendment was deemed to be effective as from September 5, 1974. (See Sarawak Government Gazette, Part II, Swk. L.N. (F) 7).

With the formation of Malaysia certain matters previously under State Control were transferred to Federal Control and listed under the Ninth Schedule of the Federal Constitution under Federal List. One of these matters is internal security which includes police, prisons, preventive detention, restriction of residence and so forth. By virtue of the Modification of Laws (Internal Security and Public Order) (Borneo States) Order 1963 certain present laws applicable to Malaya and enumerated under the First Schedule to the Order were extended to Sabah and Sarawak and called "the extension laws". One of these is the Internal Security Act, 1960. In the same way, certain present laws of Sabah and Sarawak specified in the Second Schedule of the Order continued to have effect in the two States as "the continuing laws". In Sarawak "the continuing laws" include the PPSO and subsidiary legislation made thereunder.

On May 25, 1965 the Yang Dipertuan Agung with the concurrence of the Governor in the exercise of his powers under section 74 of the Malaysia Act made the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order 1965 to come into force on Malaysia Day. (See F.L.N. 200 of 1965). Under this Order one hundred and eight State statutory instruments were declared to be federal laws. Although these state laws were declared federal laws they were peculiar to Sarawak only and effective in Sarawak only. Under this Order the PPSO and subsidiary legislation made thereunder also became federal laws.

The Minister could choose to act under either the PPSO or the Internal Security Act, 1960 when dealing with internal security in Sarawak. In this case the PPSO was used. As a result it becomes necessary to

determine its legal effect. This necessitates looking into relevant provisions of the Malaysia Act, 1963 and of the Federal Constitution.

The most appropriate provision to begin with is Article 159A of the Federal Constitution which provides that:—

"159A. The provisions of Part IV of the Malaysia Act (which contains temporary and transitional provisions in connection with the operation of that Act) shall have effect as if embodied in this Constitution, and shall have effect notwithstanding anything in this Constitution as amended by that Act; and the provisions of this Constitution, and in particular Clause (1) of Article 4 and Articles 159 and 161E shall have effect in relation thereto accordingly."

Part IV of the Malaysia Act, 1963 commences with section 73 dealing with the continuation and effect of present laws. Section 74 deals with the temporary power to modify and apply present laws. Various relevant provisions of these two sections will be referred to.

"73(1) ...all present laws, shall, on and after Malaysia Day, have effect according to their tenor, and be construed as if this Act had not been passed...."

"(3) ...the present laws of the Borneo States shall, on or after Malaysia Day, be treated as federal laws in so far as they are laws which could not be passed after Malaysia Day by the State legislature, and otherwise as State laws."

"(5) In this Part of this Act 'present laws' means the laws of the Federation or of any part thereof, of each of the Borneo States, and of Singapore passed or made or applied to any part of the Federation or to either of the Borneo States or Singapore before Malaysia Day, but does not include the Constitution of the Federation or of any State in Malaysia or this Act."

"74(1) ...the Yang di-Pertuan Agong may by order make such modifications as appear to him necessary or expedient in consequence of the passing of this Act in any present law relating to matters about which Parliament has power to make laws."

"(3) An order under subsection (1) shall not, without the concurrence of the Ruler or Governor, as the case may be, make as respects any State any provision which in an Act of Parliament could not be made or could not come into force without the agreement (however expressed) of a State authority, nor extend to the State any law relating to matters about which he Legislature of the State has power to make laws, nor modify any State law."

"(3A) In addition to the powers conferred by subsections (1) and (2); the Yang di-Pertuan Agong may, with the concurrence of the Ruler or Governor of each State in Malaysia in which the law has effect, by order declare any present law to be a federal law, whether that law relates—

(a) wholly to a matter in the Federal List; or

(b) partly to a matter in the Federal List and—

(i) partly to a matter in the State List or the Concurrent List; or

(ii) partly to a matter in the State List and partly to a matter in the Concurrent List;

and any order so made shall, unless or until it is amended or repealed, be conclusive evidence that any law declared by it to be a federal law is a federal law."

I agree with the learned judge that since the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order, 1965 was made on March 23, 1965 the said Order was made under section 74(3) and not under section 74(3A) which was added later by virtue ofthe Constitution and Malaysia Act (Amendment) Act, 1965 which received the Royal Assent on June 22, 1965. (See Act of Parliament No. 31 of 1965). The said Order was made retrospective to Malaysia Day. Annexed to the said Order is an explanatory note which reads:—

"The object of this Order is to declare as federal laws those laws of Sarawak which were in force on Malaysia Day and which the Federal and Sarawak Governments have agreed should be treated as relating to matters which on that Day were on the Federal List, e.g. it omits all 'applied legislation' and most legislation which deals with matters on the State and/or Concurrent List as well as on the Federal List."

The PPSO and subsidiary legislation made thereunder were "present laws" of Sarawak which were declared federal laws so that the powers of amendments and repeal were vested in the Federal Parliament as they became federal matters on Malaysia Day and the State Legislature could have no control. In effect the declaration in actual fact did not extend the operation of the PPSO and subsidiary legislation made thereunder throughout Malaysia. Although they are federal laws they are still exclusively Sarawak laws in the sense that they are limited in operation in Sarawak only. Article 160(2) defines "federal law" to mean (a) any existing law relating to a matter, with respect, to which Parliament has power to make laws, being a law continued in operation under Part XIII, and (b) any Act of Parliament. Part XIII is concerned with temporary and transitional provisions. According to section 73(1) the PPSO and subsidiary legislation have effect according to their tenor and should be construed without regard to the Act. Under section 73(3) they are treated as federal laws as they are laws which Council Negri could not pass after Malaysia Day.

In the case of *Assa Singh* v. *Mentri Besar, Johore*[1] the Restricted Residence Enactment (Cap. 39) of the Federated Malay States) which applied to Perak, Selangor, Negri Sembilan and Pahang, was, with modifications, extended throughout the Federation by the Restricted Residence (extended Application) Ordinance, 1948 (No. 4 of 1948). In the case under appeal there was no such extension. A distinction must be made between a State law which has been declared federal law and extended throughout Malaysia and a State law which has also been declared federal law but effective only in a State as "continuing law". Examples of the latter type are the Subordinate Courts Ordinance (Cap. 42), the Road Traffic Ordinance (Cap. 131) and until recently the Evidence Ordinance Cap. 54), Penal Code (Cap. 57) and Criminal Procedure Code (Cap. 58). With respect to the learned judge I think he is right to hold that by declaring the PPSO including its subsidiary legislations to be federal laws under section 74(3) of the Malaysia Act 1963, the legal effect would be to transfer the responsibility of administering the federal laws to the Federal authority and to vest on the Federal Parliament the power to amend or repeal such laws. Although they were declared Federal laws they were not extended to other States but effective only in Sarawak as "continuing law" being exclusive and peculiar to Sarawak. Such federal laws are transitional in nature. This means the PPSO and subsidiary legislation made thereunder are not operative outside Sarawak and would have no legal force outside Sarawak.

To sum up the Malaysia Act has given the Yang Dipertuan Agung power to make modifications to any "present law". There is no time limit. Parliament may make laws operative throughout Malaysia or operative in a particular State only. Such laws may have effect outside Malaysia. On the other hand, a

State Legislature may only make laws for the whole or only part of the State but not outside it.

The PPSO was enacted by the colonial administration in 1962 for the preservation of public security in Sarawak and had, therefore, no extra territorial effect. The PPSO is peculiar to Sarawak. Section 4(1) refers to the "situation in Sarawak" and section 4(2) to "the exigencies of the situation in Sarawak". Section 6(1) states that:—

"Any regulations made under this Ordinance may be made to apply to Sarawak as a whole or to any part thereof and to any person or class of persons or to the public generally."

Regulations 2(1) of the PPSR reads:—

"(2)(1) *The Chief Secretary or any Resident authorized by him in writing in that behalf,* in any case where it appears to him to be necessary or expedient for securing the public safety or for the maintenance of public order, may by order under his hand direct that any person named in such order shall be detained for any period not exceeding two years in such place of detention as may be specified in that order."

The words italicized were deleted and replaced by "Minister". The Chief Secretary or his representative clearly had no power to make a detention order detaining any person outside Sarawak. Has this been altered merely because the Minister has now assumed the powers which was previously vested on the Chief Secretary? I do not think so for the simple reason that the operation of the PPSO and subsidiary legislation made thereunder are effective in Sarawak only. The Minister has merely stepped into the shoes of the Chief Secretary. For the exercise of wider powers the Internal Security Act, 1960 applicable throughout Malaysia should be used. This is strengthened by Regulation 3 which provides that:—

"3(1) *The Governor in Council* may order any person detained under paragraph (1) of regulation 2 to leave and remain out of Sarawak:

Provided that no such order shall be made against—

(a) *any British subject born or naturalised in Sarawak;* or

(b) any person until he has had sufficient opportunity of making an objection against the order of detention to an Advisory Committee under the provisions of paragraph (4) of regulation 2, and such objection, if made, has been duly heard and reported on by the Advisory Committee.

For the purposes of this paragraph a person detained under paragraph (1) of regulation 2 shall be deemed to have had sufficient opportunity of making an objection against the order of detention if a period of seven clear days has elapsed after he has been informed of his right to lodge such objection in accordance with rule 3 of the Preservation of Public Security (Detention Orders) Rules, 1962.

(2) Where any person has been ordered to leave and remain out of Sarawak under paragraph (1), such order shall be deemed to include all the dependants of such person, and the provisions of paragraphs (3), (4), (5) and (6) shall apply to such dependants accordingly.

(3) Any person who has been ordered to leave and remain out of Sarawak under paragraph (1) may—

(a) be detained in custody in such place or places as the *Chief Secretary,* or any person authorized by him in that behalf, may direct, for such period as may be necessary for the purpose of making arrangements for such person to leave Sarawak;

(b) be conducted across the frontier or placed on board a ship by any police officer, and may be lawfully detained on board so long as such ship is within the territorial waters of Sarawak.

(4) An order of detention made under paragraph (1) of regulation 2, in respect of a person who has been ordered to leave and remain out of Sarawak under this regulation shall be suspended for the purpose of carrying out such order.

(5) Any person who has left Sarawak in pursuance of an order made under this regulation who returns to or enters Sarawak shall be guilty of an offence: Penalty, imprisonment for three years and a fine, and whether or not a prosecution under this paragraph has been instituted against him, may be detained in custody and conducted across the frontier or placed on board a ship under the original order made or deemed to have been made, against him under this regulation.

(6) Any person ordered, or deemed to have been ordered, to leave and remain out of Sarawak shall, while detained or in the custody of a police or prison officer or immigration officer, be deemed to be in lawful custody.

(7) an order made against any person under paragraph (1) shall be in writing, signified under the hand of the Clerk of Councils."

Amendments were made to the regulation by the Modification of Laws (Internal Security and Public Order) (Borneo States) Order, 1963. The words "Governor in Council" were replaced by "Yang di-Pertuan Agong". Proviso (a) to regulation 3(1) was replaced by a proviso which reads "(a) any person who is a Federal citizen by virtue of paragraph 2 of Part I of the Third Schedule to the Malaysia Act, 1963." The words "Chief Secretary" in Regulation 3(3)(a) were replaced by the words "local federal authority." Regulation 3(7) was deleted.

Regulation 3 is quoted *in extenso* to show purpose. The implication is clear, that is, a detainee must be detained in Sarawak. If it is the intention of the Minister to detain a detainee outside Sarawak he must resort to the Internal Security Act, 1960. If Regulation 3 is used it could only result in the deportation of a detainee and his dependants from Sarawak. This may mean deportation from Malaysia.

Dato Marshall rightly pointed out that territorial distinction is recognised in all federation. As an example he refers to section 7 of the Courts of Judicature Act, 1964 which reads:—

"7(1) All writs, summonses, warrants, orders rules, notices and mandatory processes whatsoever, whether civil or criminal, shall be issued and shall be expressed to be issued by the Lord President or the Chief Justice, as the case may be, in the name of the Yang di-Pertuan Agong and shall be signed by the Registrar and sealed or stamped with the seal or stamp of the court issuing or making the same.

(2) All writs, summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of the court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia."

He, therefore, submits that an order made by a Minister or Federal Secretary has no such territorial effect. Reference to "local federal authority" could only mean federal authority in Sarawak. Such "local federal authority" could have no executive power outside Sarawak. For instance, Sabah has its "local federal authority" and its executive power is similarly confined to that State. I think it is wrong in principle for a Minister to delegate his powers of detention to such a civil servant who is not answerable to Parliament and has no executive power outside the State, particularly when it involves the liberty of a subject.

Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is proved to have committed an offence punishable under certain provisions of the penal law.

Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors.*[2]

One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, Article 5(1) of the Constitution guarantees that "no person shall be deprived of his .. liberty except in accordance with the law." If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

The remaining provisions of Article 5 reads:—

"5(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority."

In *Assa Singh* v. *Mentri Besear, Johore*[1] the Federal Court held that although the Restricted Residence Enactment, a pre-Merdeka law, which continued to be in force after Merdeka did not contain provisions similar to clauses (3) and (4) of Article 5 it was not unconstitutional. However, it must be applied with the necessary modifications to bring it into accord with the Constitution. Therefore, the protection afforded by those two clauses must be read into the Enactment. The Federal Court, in effect, overruled the decision of Sutherland J. in *Chia Khin Sze* v. *The Menteri Besar, State of Selangor*[5] the very first case to come before the court involving the interpretation of the Constitution and approved the case of *Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan*[4] decided by Wan Suleiman J., as he then was, some ten years later.

In *Macleod* v. *Attorney-General for New South Wales*[5] appellant married Mary Manson in New South Wales in 1872. He contracted another marriage to Mary Elizabeth Cameron in Missouri, U.S.A. in 1889. He was indicted, tried and convicted in New South Wales for bigamy under section 54 of the Criminal Law Amendment Act, 1883 which reads:—

"Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years."

In reversing the judgment of the Supreme Court of New South Wales, Lord Halsbury L.C. delivering the judgment of the Privy Council held that those words must be intended to apply to those actually within the jurisdiction of the Legislature and consequently that there was no jurisdiction in the colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America.

Macleod's case[5] is authority for the principle that in interpreting a colonial law the presumption is that it is not intended to have extra-territorial effect. Lord Halsbury went on to say obiter: —

"Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, '*Extra territorium jus dicenti impune non paretur*', would be applicable to such a case."

In *Croft* v. *Dunphy*[6] the question in issue was the validity of a Canadian Act passed before the Statute of Westminster authorising customs officers to board and examine any vessel hovering in Canadian territorial waters which were defined as extending to twelve miles from the land. According to English law and its view of international law territorial waters extended to three miles from the land. The Privy Council upheld the validity of the Act, notwithstanding that it extended beyond the three mile limit. It was not in dispute that the particular topic of legislation was within the powers of the Canadian Federal Legislature. Their Lordships, therefore, saw no reason, as Lord Macmillan said, "to restrict the permitted scope of such legislation by any other considerations than one applicable to the legislation of a fully sovereign state". It should be observed that the Act was passed before the passing of the Statute of Westminster but the Privy Council heard the appeal after the passing of the Statute of Westminster by which Canada acquired dominion status.

A similar latitude was allowed to the Indian Legislature under the Government of India Act, 1935 in *Wallace Brothers & Co. Ltd.* v. *The Commissioner of Income Tax, Bombay*[7] where an Act imposing income tax on income accruing to any company if the greater part of its income arose in British India was held validly to extend to a company registered in the United Kingdom.

To settle the question regarding the competence of Dominion Parliament to make laws having extra-territorial effect. section 3 of the Statute of Westminster states that "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

Dato Marshall also cited the Singapore case of *Re Choo Jee Jeng*[8] which is seemingly against him.

In that case in an application for *habeas corpus* the court granted an order *nisi* directing the Chief Secretary and the Commissioner of Police to show cause why the writ should not issue. The applicant had been detained under a detention order made under section 3(1) of the Preservation of Public Security Ordinance, 1955 which provides that:—

"If the Governor in Council is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Malaya or the maintenance of public order therein or the maintenance therein of essential services, it is necessary so to do, the Chief Secretary shall by order under his hand make an order directing that such person be detained for any period not exceeding two years...."

One contention of the applicant was that since section 3(1) made provision for extra-territorial matters, namely, the security of Malaya and the maintenance of public order and essential services therein it was *ultra vires* the Legislative Assembly established in Singapore by the Singapore Colony Order in Council, 1955. The Singapore Legislative Assembly had in 1955 power to legislate "for the peace, order and good Government" of Singapore. Ambrose J. held that the principle to be applied in deciding whether a law was *ultra vires* the legislature of the Colony of Singapore was laid down in *Wallace Brothers & Co. Ltd.* v. *The Commissioner of Income Tax, Bombay.*[7] He stated that the test was whether section 3(1) was for the peace, order and good government of the colony, notwithstanding the fact that it might relate to persons, acts or things beyond the limit of the Colony. As the subsection provided for public security and aimed at stamping out activities prejudicial to public security carried on in the Federation of Malaya and the Colony by a subversive organisation operating in both territories, it was for the peace, order and good government of the Colony. The subsection was, therefore, not *ultra vires* the Legislative Assembly of the Colony. Ambrose J. was under the impression that the Privy Council in *Macleod* v. *Attorney-General of New South Wales*[5] relied on the Latin maxim *"Extra territorium jus dicenti impune non paretur"* in deciding against extra-territorial legislation. Lord Halsbury was referring to criminal matters for he made clear that "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed and except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever." It must be remembered that Singapore was then a Colony. Lord Halsbury had earlier in his judgment stated:—

"Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law."

With respect, if Ambrose J. was right, it would mean that there was nothing to prevent the Colony from legislating on security of Thailand, Burma and Indonesia. As a general principle Colonies can only legislate effectively only for their own territories. Ambrose J. also rejected the application for *habeas corpus* on ground that an alternative remedy before an Appeal Tribunal under the Ordinance was available. This was rightly criticised by Professor L.A. Sheridan in *Modern Law Review*, 1960 at page 79 in these words:—

"This means that a person who thinks he is wrongly imprisoned must sit in detention and wait until a body having no concern with the validity of the original imprisonment orders his release. A bizarre novelty has been invented, and Lord Atkin must be turning in his grave."

Although the Federal Secretary is a civil servant he made the Detention Order purportedly on authority delegated to him by a Minister. I have refrained myself from referring to Indian cases. Suffian F.J. as he then was, quite rightly stated in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*[9] that our law is quite different from India when power of detention is given to the highest authority acting on the advice of a Member who is answerable to Parliament and not to mere officials. He was dealing with detention under the Internal Security Act, 1960. In this case although the detention was under the PPSO the same principle applies.

Regulation 7(1) of the PPSR deals with the arrest of persons suspected of being liable to detention under regulation 2 and provides that:—

"Any such person may be detained for a period not exceeding twenty-eight days pending a decision as to whether an order for his detention under regulation 2 should be made."

Datuk James Wong was arrested on October 30, 1974 purportedly under regulation 7 of the PPSR and served with a Detention Order dated December 28, 1974. He was detained for more than twenty-eight days before the service of the Detention Order. Without proper authority any period of detention over the twenty-eight days must be regarded as illegal and could be a ground for damages for false imprisonment. The period of twenty-eight days is to give the appropriate authority time to decide whether to make a Detention Order or not. If the arrest was made under the PPSR the detainee must be kept in Sarawak otherwise the authority would be abetting the commission of an offence if the detainee should later return to Sarawak. See Regulation 3 of the PPSR.

With respect, I do not agree with the learned judge and Dato Marshall that the Federal Secretary has no power under the PPSR to make the Detention Order when the detainee is outside Sarawak. Since the PPSO and subsidiary legislation made thereunder are applicable to Sarawak only they have no legal effect elsewhere outside Sarawak. In other words, such a Detention Order could not be used outside Sarawak. It may be valid but it would be ineffective. Its validity and effectiveness would be beyond doubt if it is served on a detainee in Sarawak. As an analogy this may be likened to a Magistrate in Sarawak issuing a warrant of arrest in respect of a wanted person who is, say, in Timbuktu; but that does not make the warrant invalid. The moment that person steps into Sarawak it could be lawfully executed. It is the same with the Detention Order made under the PPSR.

That a Federal Minister has jurisdiction throughout Malaysia is not in dispute. However, if he chose to use the PPSO then his power would be limited by the provisions of the PPSO under which he could

only detain a person in Sarawak but not outside Sarawak. As the PPSO has not been extended outside Sarawak any Detention Order made thereunder could have no legal effect outside Sarawak. Therefore, neither the Minister nor the Federal Secretary could serve such a Detention Order outside Sarawak. As such Detention Order is ineffective the service would be bad and the detention would be unlawful not being in compliance with the law.

I would like to make one observation. In effect, two sets of laws relating to Internal Security apply to Sarawak. This is also the position in Sabah. Where one set of law is sufficient to deal with internal security in the country there is no necessity to have another set of similar law in any particular State. Having two sets of similar law is unsatisfactory as overlapping is inevitable. It tends also to cause confusion. Such kind of arrangement defeats the very purpose of achieving uniformity of law throughout Malaysia. Since the Internal Security Act, 1960 which is more comprehensive can be used, the PPSO and subsidiary legislation made thereunder should be removed.

For reasons given, I would dismiss the appeal. As to costs the proper order in this case is that each party would have to bear its own costs.

Wan Suleiman F.J.: I must say that I am in complete agreement with the conclusions arrived at by my learned brethren.

However, there are two points about which I feel I should add my own comments.

Whilst it is not disputed that the Minister or his delegate, the Federal Secretary, can detain a person who is in Sarawak, can either of them detain someone who is outside Sarawak? Whilst the PPSO may be federal law, it can only have effect within the boundaries of Sarawak unless the Yang Dipertuan Agung extends it under section 74(2) of the Malaysia Act either throughout Malaysia or to some specified State or States within Malaysia. The learned Lord President has, with his usual facility for simplifying complicated questions of law, made the answers so obvious that I will also say neither the Minister nor the Federal Secretary can under the PPSR detain a person whilst such person is outside Sarawak.

I would also with respect concur with their answer to the more subtle point raised in the course of the appeal. Though the Minister or his delegate does not have the power to detain a person under the PPSR whilst such person remains outside Sarawak, they can validly make a Detention Order in respect of such person whilst that person is outside Sarawak, and such order will take effect when the person concerned *enters* Sarawak.

I would also like to lend the weight of my own considered views to the observation made by the Chief Justice, Borneo in the penultimate paragraph of his judgment.

Some 13 years after Malaysia Day, one finds two component States, *i.e.* Sabah and Sarawak having each two weapons with which to deal with internal security and subversion. There can be no doubt that the Internal Security Act, 1960 is the more comprehensive and indeed the more effective legislation for such purpose. If there be any doubt on this score the result of the present appeal should dispel such doubt. It may well be that during the first few years after Malaysia Day those in charge of internal security in Sabah and Sarawak may have found the more familiar State laws which have after Malaysia Day become federal laws more convenient to administer. Surely, however, there has been adequate time for them to become familiar with the Internal Security Act, 1960. I would therefore echo the sentiments of the Chief Justice, Borneo and say that the continuing process of keeping the statute books in order by weeding out superfluous legislation could usefully include the early removal of these redundant laws which have outlived their usefulness.

Appeal dismissed.

Solicitors: *Reddi & Co.*

THERESA CHONG v. KIN KHOON & CO.

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F.JJ.) August 28, 1976]

[Ipoh — Federal Court Civil Appeal No. 26 of 1976]

Contract — Agreement entered into with person as remisier — Person not registered with the Stock Exchange as remisier — Whether contract contrary to public policy — Contracts Act, 1950, s. 24

Share Brokers — Remisier — Not registered — Agreement — Effect of.

This was an appeal from the decision of Wan Hamzah J. who held that the appellant was liable to pay the respondents a sum of $35,330.25 being the amount due under a series of share dealings between the plaintiffs and the defendants. The learned trial judge held that the appellant acted as remisier for the respondents, although she was not registered with the Stock Exchange as such. He nevertheless held that although there was a violation of the rules of the Stock Exchange the contract was valid and not illegal as being contrary to public policy. On appeal it was argued that the learned trial judge should have held that the contract was illegal and void and/or alternatively that the court would not assist a plaintiff in enforcing a contract which contravened the rules of the Stock Exchange.

Held, dismissing the appeal: the contract did not fit into any of the traditional pigeon holes of contracts contrary to public policy and therefore the learned trial judge was correct in holding that the contract was not illegal.

Cases referred to:-

(1) *Scott* v. *Brown Doering, McNab & Co.* [1892] 2 Q.B. 724.

(2) *Montfiore* v. *Menday Motor Components Co. Ltd.* [1918] 2 K.B. 241.

(3) *Monkland* v. *Jack Barclay Ltd.* [1951] 2 K.B. 252, 265.

(4) *Fender* v. *St. John Milmay* [1938] A.C. 1.

(5) *Nagle* v. *Feilden* [1966] 2 Q.B. 633.

(6) *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1967] 2 W.L.R. 871.

FEDERAL COURT.

Lim Ewe Hock for the appellant.

N.T. Rajah for the respondents.

In the court below the following judgment was delivered on December 31, 1975: